



## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 354

[Docket No. APHIS-2013-0021]

#### User Fees for Agricultural Quarantine and Inspection Services

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending our regulations governing the user fees charged for certain Agricultural Quarantine and Inspection (AQI) services. We are reducing the fees charged to remove surcharges that were intended to fund a reserve. This action is necessary in order to ensure the regulations reflect an operational reduction of AQI fees that was announced through a November 1, 2022, Stakeholder Registry announcement, issued to comply with a September 15, 2022, judgment of the United States District Court for the District of Columbia, and which took effect on December 1, 2022.

**DATES:** Effective March 17, 2023.

**FOR FURTHER INFORMATION CONTACT:** Mr. George Balady, Senior Regulatory Policy Specialist, APHIS, 4700 River Road Unit 131, Riverdale, MD 20737 1231; (301) 851-2338; email: [AQI.User.Fees@usda.gov](mailto:AQI.User.Fees@usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Food, Agriculture, Conservation, and Trade (FACT) Act of 1990 (21 U.S.C. 136a) authorizes the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture to collect user fees to fully fund its agricultural quarantine and inspection (AQI) services program. These user fees must be sufficient to cover the costs of:

- Providing AQI services in connection with the arrival, at a port in the customs territory of the United States, of an international passenger, commercial vessel, commercial aircraft, commercial truck, or railroad car (21 U.S.C. 136a(a)(1)(A));
- Providing preclearance or preinspection at a site outside the customs territory of the United States of an international passenger, commercial vessel, commercial aircraft, commercial truck, or railroad car (21 U.S.C. 136a(a)(1)(A));
- Administering the AQI Program (21 U.S.C. 136a(a)(1)(B)); and
- Through fiscal year 2002, maintaining a reasonable balance in the AQI User Fee Account also established by the Act (21 U.S.C. 136a(a)(1)(C)).

In the April 25, 2014, *Federal Register* (79 FR 22895-22908, Docket No. APHIS-2013-0021), we issued a proposal to update the methodology by which APHIS would calculate AQI user fees for the user fee classes subject to 21 U.S.C. 136a. Relying on this updated methodology, we also proposed new AQI user fee rates. Such a change was necessary to address historic underfunding of the AQI program.

Following a comment period and review of public comments, on October 29, 2015, we issued a final rule in the *Federal Register* to revise the AQI user fees (80 FR 66748-66779; Docket No. APHIS-2013-0021).<sup>1</sup> Under the 2015 final rule, four of the user fees (for commercial trucks and truck transponders, international air passengers, and international cruise ship passengers) included a 3.5 percent reserve surcharge above unit cost as part of the fee structure. All other fees set in the 2015 final rule were set at or slightly below unit cost and, therefore, did not include a reserve surcharge, and accordingly did not collect for maintenance of the reserve.

On May 13, 2016, the Air Transport Association of America and the International Air Transport Association filed suit against APHIS, claiming the final rule updating the fees for its

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<sup>1</sup> To view the proposed rule, its supporting documents, the comments that we received, or the final rule, go to <https://www.regulations.gov/docket/APHIS-2013-0021>.

AQI program violated the FACT Act and the Administrative Procedure Act. On June 21, 2022, the United States Court of Appeals for the District of Columbia Circuit issued an opinion that rejected the bulk of the challenges to APHIS's fee-setting. *See Air Transport Ass'n of Am. v. United States Dep't of Agric.*, 37 F.4th 667 (D.C. Cir. 2022). However, the Court held that APHIS' authority to set and collect fees at a level to fund a reserve expired in 2002. The Court remanded this issue to the United States District Court for the District of Columbia for proceedings consistent with the appellate court's opinion. On September 15, 2022, the District Court issued a final judgment vacating the final rule only insofar as it authorizes collecting fees to maintain a reserve account.

Consistent with this September 15, 2022, final judgment, on November 1, 2022, APHIS issued a Stakeholder Registry<sup>2</sup> announcement stating that we were removing the 3.5 percent reserve surcharge from each fee class to which it had been applied and, effective December 1, 2022, no longer collecting the reserve component for AQI user fees.

This rule codifies that change in operational policy by revising the regulations to reflect the new fee rates.

### **Effective Date**

The Court held that APHIS' authority to collect fees sufficient to maintain a reserve expired after fiscal year 2002 and, therefore, the 2015 final rule violated the FACT Act to the extent it set user fees at a level sufficient to maintain a reasonable balance in the AQI user fee account (*See Air Transport Ass'n of Am.*, 37 F.4th at 673). However, the Court upheld the remaining aspects of the 2015 final rule with respect to all other challenges. As a result of the September 15, 2022, final judgment, the Agency is legally obligated to remove the reserve surcharge from any fees that were set at a level to include such a surcharge. Accordingly, on November 1, 2022, APHIS issued a Stakeholder Registry announcement operationally removing

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<sup>2</sup> To view the Stakeholder Registry announcement, go to:  
[https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2022/aqi-user-fees-response](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2022/aqi-user-fees-response).

the surcharge from any fees that had been set to include it, thereby lowering those fees, effective December 1, 2022. In that same announcement, APHIS set forth its basis for lowering the fees operationally and without opportunity for public comment.

In the announcement, APHIS indicated that we would “publish a final rule in the *Federal Register* to codify this administrative action.” Insofar as this rule codifies current Agency operational policy and ensures alignment between the fees operationally assessed and the fee levels set forth in the regulations, this rule pertains to Agency procedure, and is thus exempt from the need for public comment pursuant to paragraph (b)(3) of 5 U.S.C 553. Moreover, the good cause that APHIS found for making the Stakeholder Registry announcement effective without prior public comment remains and applies equally to this rule; no public comment could alter the Court’s mandate to vacate the portion of the final rule that collects fees to maintain a reserve. Finally, this rule is exempt from Executive Orders 12866 and 12988, and is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 501).

### **Paperwork Reduction Act**

This final rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

### **List of Subjects in 7 CFR Part 354**

Animal diseases, Exports, Government employees, Imports, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Travel and transportation expenses.

Accordingly, we are amending 7 CFR part 354 as follows:

### **PART 354—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS; AND USER FEES**

1. The authority citation for part 354 continues to read as follows:

**Authority:** 7 U.S.C. 7701-7772, 7781-7786, and 8301-8317; 21 U.S.C. 136 and 136a; 49 U.S.C. 80503; 7 CFR 2.22, 2.80, and 371.3.

2. Section 354.3 is amended by revising the table in paragraph (c)(1) and by revising paragraph (f)(1) to read as follows:

**§ 354.3 User fees for certain international services.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

**Table 2 to Paragraph (c)(1)**

Effective date	Amount
Beginning [Insert date of publication in the <i>Federal Register</i> ]	\$7.29

\* \* \* \* \*

(f) *Fee for inspection of international passengers.* (1) Except as specified in paragraph (f)(2) of this section, each passenger aboard a commercial aircraft or cruise ship who is subject to inspection under part 330 of this chapter or 9 CFR, chapter I, subchapter D, upon arrival from a place outside of the customs territory of the United States, must pay an AQI user fee. The AQI user fee will apply to tickets purchased beginning [Insert date of publication in the *Federal Register*]. The fees are shown in the following table:

**Table 5 to Paragraph (f)(1)**

Effective dates <sup>1</sup>	Passenger type	Amount
Beginning [Insert date of publication in the <i>Federal Register</i> ]	Commercial aircraft	\$3.83
Beginning [Insert date of publication in the <i>Federal Register</i> ]	Cruise ship	\$1.68

<sup>1</sup>Persons who issue international airline and cruise line tickets or travel documents are responsible for collecting the AQI international airline passenger user fee and the international cruise ship passenger user fee from ticket purchasers. Issuers must collect the fee applicable at the time tickets are sold. In the event that ticket sellers do not collect the AQI user fee when tickets are sold, the air carrier or cruise line must collect the user fee that is applicable at the time of departure from the passenger upon departure.

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Done in Washington, DC, this 9th day of March 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

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